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No. 03-1457

IN THE

# Supreme Court of the United States

METROPOLITAN STEVEDORE COMPANY
*Petitioner*,

v.

CRESCENT WHARF & WAREHOUSE COMPANY, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37(b) of the Supreme Court of the United States, the National Association of Waterfront Employers ("NAWE") and Signal Mutual Indemnity Association, LTD. move for leave to file the brief *amicus curiae* in support of Petitioner for the reasons stated below. NAWE is a nationwide §501(c)(6) association of private sector marine terminal operators/stevedores whose member companies hire the longshore labor to load and unload vessels at the vast majority of general cargo and container terminals in the U.S. NAWE members comprise a substantial block of the employers covered by the Longshore and Harbor Workers'

Compensation Act ("LHWCA" or "Act"), and the longshore employees hired by NAWE members on a daily basis to handle the cargo likely comprise a majority of the employees covered by the Act on any given day.

Signal Mutual Indemnity Association, Ltd. is the largest group self-insurance facility authorized by the Secretary of Labor to secure compensation benefits for its 200 plus members.

NAWE members and Signal members take seriously their LHWCA financial obligations to provide for, and insure against, employee claims for work related injuries and illnesses, and therefore have a direct interest in seeking to have this Court fashion changes to the 'last employer' rule that will preclude its application by the Department of Labor in circumstances when the record contains substantial evidence indicating that the nominal last employer cannot fairly be held responsible for the claim.

To be sure, *amici* stress that they wish to preserve the 'last employer' rule in those circumstances where the evidentiary record properly supports the designation of a 'last employer' as the liable employer. Every NAWE member understands that, at one time or another, each 'will have its turn in the barrel' and be designated the 'last employer.'

Respectfully submitted,

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## BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS AND SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., IN SUPPORT OF PETITIONER

## STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The interests of *amicus curiae* in this matter are detailed in the accompanying Motion for Leave to File the Brief *Amicus*

[1] Pursuant to Rule 37.6, counsel states that they authored this brief in its entirety, and that no party has made a financial contribution to the brief other than members of *amicus* through their annual dues assessment. Pursuant to Rule 37(2)(b), counsel for Petitioner, the Federal Respondent, and Respondent Crescent Wharf have granted consent to file this brief. Their letters have been filed with the clerk of the court. Counsel for the other respondents have not granted consent.

*Curiae* in Support of Petitioners, and in the interest of reducing the burden on the Court, will not be restated here but should be incorporated herein.

## SUMMARY OF ARGUMENT

*Amicus* submits that the decision of the circuit court deserves review because the 'last employer' rule, a substantive rule of maritime law, is too often applied in a fashion that produces administrative convenience instead of fundamental fairness. *Amicus* believes the rule can be structured by the Court to produce a rule which is fair to all covered employers involved in the employment chain. Thus the decision below should be reviewed to conform the rule to the fundamental compensation concepts found in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*("LHWCA" or "Act"), the evidentiary requirements of the Administrative Procedure Act, 5 U.S.C. § 556, and this Court's controlling opinion in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267(1994).

For these reasons, *amicus* submits that the Petition for Certiorari should be granted.

## ARGUMENT

### I. THE *CARDILLO* LAST EMPLOYER RULE ("*CARDILLO* RULE") IS A RULE OF CONVENIENCE CREATED BY THE FEDERAL COURTS AS PART OF THE SUBSTANTIVE MARITIME LAW OF THE UNITED STATES, AND NOW NEEDS TO BE REVIEWED BY THE COURT.

The power to regulate admiralty and maritime matters flows from the Constitution of the United States to the federal judiciary. Article III, § 2, cl.1. Unlike other areas of federal law, where the role of the federal courts is limited to interpretation, in the area of admiralty and maritime law, the

federal courts have a far greater role. The Constitution grants the federal courts the power to interpret admiralty and maritime law, but also grants to the federal courts the power to develop on their own new substantive admiralty and maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). The Court has noted that its power to regulate maritime law is shared with the Congress. *Washington v. Dawson*, 264 U.S. 219 (1924).

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA" or "Act"), is a product of this Constitutional structure. The LHWCA was enacted following this Court's holdings that states are preempted from regulating maritime commerce. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and that the authority to regulate maritime law is non-delegable to the states, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920). Therefore, states are constitutionally barred from applying state workers' compensation laws to maritime employees. In response to this constitutional bar, Congress enacted a federal workers' compensation statute to cover designated maritime employees—the LHWCA.

Not only is the LHWCA a product of this constitutional structure, but the rule of law at issue in this petition—the so called *Cardillo* Rule—also hails from this structure even though it has no textual basis in the LHWCA. Instead, this substantive rule of law was created some 50 years ago by the Second Circuit. *Travelers Ins. Co. v. Cardillo*, 225 F2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). While it has since been adopted by a number of other circuits, it has never been reviewed by this Court. With its application to the facts below, however, the *Cardillo* Rule has now evolved from its original purpose as a useful rule of convenience to become an absolute rule imposing liability regardless of the underlying facts. Essentially, it has become the 'last employer, period' rule.

*Amicus* urges the Court to take this opportunity to ratify the *Cardillo* Rule as part of the substantive admiralty and maritime law of the United States, while clarifying the contours of the rule to preclude its routine application as a rule of convenience to any employer designated the 'last employer'—regardless of the state of the evidence indicating that work related injury during a period of prior employment may be more reasonably pointed to as responsible for the underlying injury and claim.

## II. THE PETITION SHOULD BE GRANTED SO THAT THE *CARDILLO* RULE CAN BE STRUCTURED TO CONFORM TO THE BODY OF EVIDENTIARY STANDARDS NOW APPLICABLE TO ADJUDICATIONS BEFORE FEDERAL AGENCIES AND COURTS.

The fundamental policy underlying the LHWCA is that each covered employer is solely liable for work related injuries to his employees, and is to take steps to ensure payment of benefits when necessary. With the notable court made exception set out in *Cardillo*, the Act absolves other employers in the chain of employment from liability. As an initial matter, *amicus* stresses that the employers it represents normally have no quarrel with the application of the *Cardillo* Rule, or its rational as set forth by the *Cardillo* court. Indeed these employers long ago concluded that the *Cardillo* Rule is ordinarily a fair extra statutory device to assign liability—in lieu of apportionment—in claims involving several successive employers when the timeliness of causation cannot be pinned down with sufficient evidentiary certainty. Simply put, in this circumstance, when, as the last employer, 'it is your turn in the barrel,' you are tagged with the liability for the claim.

The same cannot be said, however, when applying the *Cardillo* Rule to certain claims—such as that below—which produce substantial, reliable, and relevant evidence to prove that work performed by a claimant during his tenure with the nominal last employer simply could not have been a factor in the underlying claim. *Amicus* suggests that the circuit court's blind application of the *Cardillo* Rule, ignoring the state of the reliable evidence found in the record, deprives the Petitioner, as well as every other employer yet to be cast as the last employer in similar circumstances, of its statutory right to rebut causation by producing substantial evidence to the contrary, as expressly allowed for by § 20(a) of the LHWCA, 33 U.S.C. § 920(a), and § 7(c) of the APA, 5 U.S.C. § 556(d). The circuit court's cold application of the *Cardillo* Rule in this circumstance effectively creates an irrebutable presumption and flies in the face of the Court's underlying rationale in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

*Amicus* submits that the Court should not allow the *Cardillo* rule to become just another blindly applied rule of convenience, and asks the Court to use its constitutional maritime authority to refashion the rule in a way that takes into account all of the relevant facts placed into the record that may point to employment periods with another employer as more fairly responsible for the injury.

Thus, in order to cure the short-sighted application of the *Cardillo* Rule to claims such as that below, *amicus* suggests that the Petition for Certiorari be granted so that the *Cardillo* Rule can be structured to align it with the basic evidentiary policies of the underlying statutes, and this Court's all important APA jurisprudence.

## CONCLUSION

For the aforementioned reasons *amicus* respectfully submits that the Petition for Certiorari should be granted.

Respectfully submitted,

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